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No. 83-435

IN THE

Supreme Court of the United States

October Term, 1983

THE WICHITA BOARD OF TRADE, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. McCARTHY
Counsel of Record

DANIEL J. SWEENEY
1750 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 393-5710

McCARTHY, SWEENEY & HARKAWAY, P.C.
Of Counsel

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TABLE OF CONTENTS

PAGE

I. Refunds Are Not Within the Primary Jurisdiction of the Commission 1

A. The Court of Appeals' Decision is Incompatible with Case Law 1

B. The Court of Appeals' Decision is Incompatible with the Statute 4

C. The Background of this Case Does Not Support the Court of Appeals' Decision 5

II. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

A.J. Phillips Co. v. Grand Trunk Western Ry. Co., 236 U.S. 662 (1915) 4, 5

Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 2, 3

Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 433 U.S. 902 (1977) 2, 3

Burlington Northern, Inc. v. United States, ____ U.S. ____, 103 S.Ct. 514 (1982) 2, 3

ICC v. B&T Transportation Co., 613 F.2d 1182 (1st Cir. 1980) 4

Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir.

1970), *cert. denied*, 402 U.S. 999 (1971) 4

United States v. ICC, 337 U.S. 426 (1949) 4

STATUTES

Interstate Commerce Act:

49 U.S.C. §8 4

49 U.S.C. §9 ..... 4, 5

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I. REFUNDS ARE NOT WITHIN THE PRIMARY JURISDICTION OF THE COMMISSION

A. A Court of Appeals' Decision Is Incompatible With Case Law

Is the primary jurisdiction of the Interstate Commerce Commission, which has long been recognized to be appropriate for determinations of rate reasonableness, now to be extended to the ultimate determination of whether to grant refunds or reparations of amounts collected through unlawful rates? The brief of the government respondents answers this central question in the affirmative, arguing that "the Commission has primary jurisdiction and thus must initially determine whether refunds or damages should be awarded in connection with interstate railroad rate decisions" (brief at p. 5).

Note particularly the breadth with which the rule is stated. Primary jurisdiction is not said to be applicable in the circumstances of this case, but is applicable generally to the question of refunds or damages "in connection with interstate railroad rate decisions." This new rule, under which courts would be required to defer to the Commission on the ultimate question of whether to award damages, would supplant the current practice, under which courts, in the exercise of their discretion, tend to refer issues of rate reasonableness to the Commission, but decide on their own whether to award refunds when the Commission finds a rate unlawful.

It should by obvious that the importance of this new rule, which would apply (at least in the Tenth Circuit) whenever a court faces a refund issue, extends beyond this case, and that this case therefore cannot be considered *sui generis*, as the brief of the government respondents implies (brief at 6). The rule is, moreover, defective in that it is incompatible with case law, incompatible with the statute, and represents an unwarranted diminution in the discretion of federal courts.

The brief of the government respondents sheds little light on these problems. In a scant three pages (excluding footnotes) of argument, the brief cites *Wichita I*[1] and *Burlington Northern* in support of the new rule, offering the rationale that a refund order is somehow equivalent to an order setting rates, and that, since rate reasonableness is a matter for the Commission's primary jurisdiction, refunds

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[1] In the interest of brevity we will cite this Court's original decision in this case, *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973) as *Wichita I*. This Court's per curiam remand order, reported as *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 433 U.S. 902 (1977) will be cited as *Wichita II*.

should be treated the same way.[2] This rationale was never mentioned by the court of appeals, but the argument of the government respondents suffers from a more fundamental defect: *Wichita I* and *Burlington Northern* simply do not support the court of appeals' new rule.[3] The cited cases do establish that rate *reasonableness* is within the primary jurisdiction of the Commission, a principle which we do not contest. However, those cases provide no support for the proposition that a decision on refunds is also within the Commission's primary jurisdiction, or that a court which faces the refund issue after the Commission has decided the reasonableness issue must refer the refund decision to the Commission.[4]

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[2] The railroad respondents appear to take a different tack, arguing for primary jurisdiction in the Commission "in the unique circumstances of this case" (brief at 8). However, this argument rests on the railroads' contention that this is a Section 15(7) case, a contention which was rejected by the Commission (see quotation at p. 6, *infra*) and this Court (App. ii (c) at A-48). This case is, in fact, more akin to a case involving district court jurisdiction over refunds under Sections 8 and 9.

[3] As was demonstrated in the Petition for Writ of Certiorari (at pp. 16-17), *Burlington Northern* is shown to be inapposite by the very language quoted by the court of appeals.

[4] The government respondents also rely on *Wichita I* and *Wichita II* in attempting to distinguish *A.J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U.S. 662 (1915), and *United States v. Morgan*, 307 U.S. 183 (1939). Since neither *Wichita I* nor *Wichita II* supports a new rule of Commission primary jurisdiction over refunds, it cannot seriously be argued that those cases overruled, *sub silentio*, *Phillips* or *Morgan III*.

The determination of the court of appeals that reasonableness *and refunds* are for the Commission to decide in the first instance is inconsistent with numerous cases in which courts have made the decision whether to award damages, based upon a Commission determination of the reasonableness issue. See, *e.g., Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) in which the district court concluded that the equities of the situation did not justify the granting of damages to shippers who paid unlawful rates. The court of appeals reversed. Each court decided the damages issue for itself. Neither court found it necessary to refer the refund issue to the Commission for decision in the exercise of the Commission's primary jurisdiction. See also the discussion and case citations in the dissenting opinion of Justices Frankfurter, Jackson and Burton in *United States v. ICC*, 337 U.S. 426, 464-66 (1949), and *ICC v. B&T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980) discussing the range of powers available to a district court to formulate overcharge remedies.

B. The Court of Appeals' Decision Is Incompatible with the Statute

The Interstate Commerce Act itself necessitates rejection of the court of appeals' conclusion that reparations are within the primary jurisdiction of the Commission. Section 8 of the Act gives shippers an absolute right to recover damages for the imposition of unlawful charges. Section 9 permits a shipper claiming to be damaged by a common carrier to "make complaint to the Commission" or "bring suit...for the recovery of damages" in district court. A shipper who commences his Section 9 reparation

proceeding in district court may have to obtain a Commission ruling on rate reasonableness under the primary jurisdiction doctrine. But the court of appeals has now held that not just a determination of reasonableness, but also the ultimate decision on damages, can only be made by the Commission. What then remains for the district court to do, and what is left of Section 9's option of bringing suit for damages in court? The court of appeals' decision would grant unprecedented new authority to the Commission, at the expense of the federal courts and to the detriment of shippers' choices under the Interstate Commerce Act.[5]

C. The Background Of This Case Does Not Support The Court Of Appeals' Decision

The court of appeals' holding cannot be sustained as a general principle of administrative law. *A fortiori,* that holding cannot be sustained in this case.

In the first place, this Court expressly ordered the district court to decide whether the amounts collected under the unlawful rates should be kept by the railroads or returned to the shippers. There is, moreover, nothing in the history of this case to countermand that directive, or to suggest to the district court or the parties that they were not operating under the established rule that, while reasonableness determinations are for the Commission, refund decisions are for the court. And, contrary to the implication of the railroad respondents, the challenged rates have been found unlawful by the Commission. See Petition for Writ of Certiorari, p. 6, n. 5.

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[5] For an example of how the Commission intends to exercise that authority, see the Commission's decision in the *Commodity Credit Corporation* case, Appendix A to the railroads' brief. In that case, which argues eloquently *for* granting certiorari, the Commission shows that it now proposes to deny to shippers who have paid unlawful rates the right to damages conferred by Section 8 and confirmed in *A.J. Phillips & Co., supra.*

The Commission itself clearly recognized that its decision was not binding on the district court. See App. (ii) (g), at A-139, where the Commission explained the situation as follows:

> The Secretary of Agriculture's petition is directed to our statutory authority to order refunds under section 15 (7) of the act. In the Wichita Board of Trade case our duty is to advise the district court as to the equitable disposition of those monies under its control.

See also that same decision at A-152, where the Commission concluded by ordering: "That the District Court for the District of Kansas be advised not to refund those monies under its jurisdiction."

Under the circumstances, it is not surprising that these shipper parties renewed their motion for refunds in the District Court for the District of Kansas, rather than filing a petition for review of the Commission decision. Petitioners must not be penalized for failing to anticipate that the court of appeals would make new (and, in our judgment, bad) law concerning the doctrine of primary jurisdiction.

II. CONCLUSION

For the foregoing reasons, certiorari should be granted and the decision of the court of appeals should be reversed summarily or the case should be set for briefing and oral argument.

Respectfully submitted,

CHARLES J. McCARTHY
Counsel of Record
DANIEL J. SWEENEY
1750 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 393-5710

McCARTHY, SWEENEY & HARKAWAY, P.C.
Of Counsel

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